

THE CONSTITUTIONALITY OF THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003
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INTRODUCTION.

In 2006, the Supreme Court set the stage for its most significant ruling on abortion rights in almost fifteen years¹ when it granted *certiori* to determine the constitutionality of the Partial Birth Abortion Ban Act of 2003² (hereinafter the “Act”) during its next term.³ The Act imposes civil and criminal penalties on physicians who perform “partial-birth abortions.”⁴ The medical community, however, does not recognize “partial-birth abortion” as a particular medical procedure.⁵

¹ Charles Lane, *Abortion Case to Test New Justices: Court Will Review ‘Partial Birth’ Ban*, WASHINGTON POST (Feb. 22, 2006).

² Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531 (2003).

³ *See* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (hereinafter “*Carhart II*”), *cert. granted*, (U.S. Feb. 21, 2006) (No. 05-280).

⁴ 18 U.S.C. § 1531.

⁵ *See, e.g.*, American Medical Association, Policy Files, H-5.982 Late-Term Pregnancy Termination Techniques, <http://www.ama-assn.org> (then search partial-birth abortion and select the second option in the list entitled AMA Policy Finder - American Medical Association) (hereinafter “AMA Policy File H-5.982”) (last visited April 30, 2006) (“The term ‘partial birth abortion’ is not a medical term.”); *Planned Parenthood v. Gonzales*, 435 F.3d 1163, 1166 (9th Cir. 2006) (hereinafter “*Planned Parenthood II*”) (determining that “the Act essentially regulates previability second trimester abortions” and referring throughout the decision to the procedures at issue as “second trimester abortions”); *Partial Birth Abortion Ban*, NewsHour with Jim Lehrer

Immediately after President Bush signed the Act into law in November 2003, abortion physicians and abortion rights activists challenged the Act in court. In 2004, three federal district courts found the Act unconstitutional.⁶ The United States Court of Appeals for the Eighth Circuit affirmed the District Court of Nebraska's opinion.⁷ The United States Courts of Appeals for the Second and Ninth Circuits upheld the district courts' opinions as well, both on January 31, 2006.⁸ Each of the three appellate courts based their decisions on different reasons,

Transcript (Nov. 5, 2003) (on file with author) (quoting Dr. Paula Hillard, a professor of obstetrics and gynecology at the University of Cincinnati College of Medicine stating the medical community does not use the term "partial-birth abortion"). Consequently, I will refer to "second term abortions," "third term abortions," or collectively, "late term abortions" when I discuss the procedures at issue in these cases and statutes, which physicians typically perform during the second and third trimester of pregnancy.

⁶ See *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1048 (D.Neb. 2004) (hereinafter "*Carhart*") (enjoining enforcement of the Act); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 493 (S.D.N.Y. 2004) (hereinafter "*Nat'l Abortion Fed'n*") (prohibiting enforcement of the Act); *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957, 1034-35 (N.D.Cal. 2004) (hereinafter "*Planned Parenthood*") (finding the Act unconstitutional because it is vague, imposes an undue burden on a woman's choice to have an abortion during her second trimester, and does not contain an exception for abortions that endanger the pregnant woman's health).

⁷ *Carhart II*, 413 F.3d at 792.

⁸ *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 285 (2nd Cir. 2006) (hereinafter "*Nat'l Abortion Fed'n II*"); *Planned Parenthood II*, 435 F.3d at 1191.

though all three agreed the Act was unconstitutional because it did not contain an exception where the pregnant woman's health was in danger.⁹

This Article argues that the Supreme Court must find the Act unconstitutional. Part I will describe the abortion procedures at issue in late term abortion jurisprudence.¹⁰ Also in Part I, I will describe relevant abortion case law, the Act's statutory restrictions, and explain the differences between the recent circuit court decisions finding the Act unconstitutional.¹¹ In Part II, I will show the Act cannot withstand constitutional scrutiny as established by Supreme Court abortion jurisprudence because it is unconstitutionally vague, it imposes an undue burden on women who want to terminate their pregnancies, and it does not contain an exception when a pregnant woman's health is in danger.¹² After demonstrating that the Supreme Court has no choice but to find the Act unconstitutional, this Article ultimately recommends that Congress repeal the Act and allow women and their doctors to make the difficult decision whether to have a late-term abortion without government intervention.¹³

⁹ *Nat'l Abortion Fed'n II*, 437 F.3d at 290; *Planned Parenthood II*, 435 F.3d at 1191; *Carhart II*, 413 F.3d at 803-04.

¹⁰ *See infra* notes 25-54 (explaining differences between and risks of late-term abortion procedures).

¹¹ *See infra* notes 55-96 (tracing history of relevant abortion jurisprudence and articulating current legal analysis of abortion statutes).

¹² *See infra* notes 102 – 201 (evaluating the Act under the Court's contemporary abortion jurisprudence and concluding that it fails each of three important rules).

¹³ *See infra*, Conclusion (describing the evolution of the author's research and opinions on this topic while drafting the Article).

I. RELEVANT ABORTION PROCEDURES AND JURISPRUDENCE.

Abortion physicians perform only ten percent of abortions after the first trimester of pregnancy.¹⁴ The majority of women carrying their pregnancies to term gestate for approximately forty weeks from conception to childbirth.¹⁵ The first trimester begins on the date of the woman's last menstrual period and lasts until the thirteenth or fourteenth week of pregnancy.¹⁶ The second trimester lasts until approximately the twenty-seventh week of

¹⁴ See *An Overview of Abortion in the United States*, Allen Guttmacher Institute, http://www.agi-usa.org/presentations/abort_slides.pdf (hereinafter "*An Overview of Abortion in the United States*") ("Fewer than 2% of abortions are performed after 20 weeks. An estimated 0.08% of abortions are performed after 24 weeks, when the fetus may be viable." (2005)); see also *Planned Parenthood II*, 435 F.3d at 1166 ("The vast majority of abortions in the United States are performed during the first trimester.").

¹⁵ See Euro-American Medical Group, *Pregnancy*, <http://www.eamg-med.com/pregnancy/pregnancy.shtml> (last visited April 30, 2006) (explaining the trimester division system); see also *Planned Parenthood*, 320 F. Supp. 2d at 960 (noting physicians set the date of conception at two weeks after the pregnant woman's last menstrual period).

¹⁶ *Your Developing Baby*, American Pregnancy Association, <http://www.americanpregnancy.org/duringpregnancy/index.htm> (last visited April 30, 2006) hereinafter "*Your Developing Baby*"; see also *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000) (hereinafter "*Stenberg*"); *Planned Parenthood II*, 435 F.3d at 1166, n.1 (citing *Planned Parenthood*, 320 F. Supp. 2d at 960).

pregnancy.¹⁷ Approximately nine or ten percent of abortions occur during the second trimester, and less than one percent during the third trimester.¹⁸ Though the Court recognizes that determinations of viability are inexact,¹⁹ physicians typically consider that a fetus reaches viability at approximately the twenty-fourth week.²⁰ Less than one and one half percent of abortions occur after the twentieth week.²¹ The Eighth Circuit noted that “only a tiny percentage

¹⁷ See, e.g., Euro-American Medical Group, *Pregnancy*, <http://www.eamg-med.com/pregnancy/pregnancy.shtml> (last visited April 30, 2006) (explaining the trimester division system based on the weeks of pregnancy following conception); *Your Developing Baby*, *supra* note 16; *Planned Parenthood II*, 435 F.3d at 1166, n.1 (citing *Planned Parenthood*, 320 F. Supp. 2d at 960).

¹⁸ E.g., *An Overview of Abortion in the United States*, *supra* note 14; see also *Stenberg*, 530 U.S. at 924 (specifying that ninety percent of abortions in the United States are performed before the twelfth week of pregnancy).

¹⁹ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 64-65 (1976) (holding fixed gestational limits for determining viability unconstitutional and granting attending physicians the right to ascertain viability on an individual basis because viability may vary with each pregnancy); see also AMA Policy File H-5.982, *supra* note 5 (“The viability of the fetus and the time when viability is achieved may vary with each pregnancy. In the second-trimester when viability may be in question, it is the physician who should determine the viability of a specific fetus, using the latest available diagnostic technology.”).

²⁰ *An Overview of Abortion in the United States*, *supra* note 14; *Planned Parenthood II*, 435 F.3d at 1166, n.1 (citing *Planned Parenthood*, 320 F. Supp. 2d at 960).

²¹ *An Overview of Abortion in the United States*, *supra* note 14; *Carhart*, 331 F. Supp. 2d at 916.

of abortions are performed after viability may have commenced.”²² Doctors often perform abortions late in a pregnancy because tragedy occurs such as a serious risk to the pregnant woman’s health or life or a fetus has deformities so severe that it may be unable to survive outside the womb.²³ Physicians often do not discover fetal and maternal health problems earlier in a pregnancy because the procedures that detect such conditions are not available until the second trimester.²⁴

²² *Planned Parenthood II*, 435 F.3d at 1166.

²³ See e.g., *Planned Parenthood II*, 435 F.3d at 1166 (noting that few abortions are performed after the twenty-fourth week of pregnancy and even fewer in the third trimester, and “in both cases [are] almost always for medical reasons”); Alissa Schechter, Note, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 *FORDHAM L. REV.* 1987 (2005) (telling the story of Vicki, a woman who found out eight months into her pregnancy that her fetus had nine major abnormalities, would never live outside the womb, and would pose a risk to her own health and ability to have children again if she carried it to term). Vicki had a late-term abortion and went on to have other children. Under the Act, however, Vicki would not have been able to abort her malformed fetus. *Id.* But see *An Overview of Abortion in the United States*, *supra* note 14 (listing the top four reasons women have abortions more than the sixteen weeks after their last menstrual periods as: (1) did not realize she was pregnant, (2) difficulty making arrangements for abortion, (3) afraid to tell parents or partner, and (4) needed time to make the decision).

²⁴ See *Planned Parenthood II*, 435 F.3d at 1166 (listing the procedures that detect such conditions as ultrasound and amniocentesis).

A. Abortion Procedures.

Abortion is one of the safest surgical procedures for women, largely because physicians perform the majority of abortion procedures early in pregnancies.²⁵ Vacuum aspiration²⁶ is the most common abortion procedure during the first trimester.²⁷ However, as the pregnancy

²⁵ See *An Overview of Abortion in the United States*, *supra* note 14 (“On average, 10 women each year die from induced abortion, compared with about 275 who die from pregnancy and childbirth.”) The Guttmacher Institute further explains the risk from terminating pregnancies as gestation progresses, noting that before nine weeks, one out of every 1,000,000 abortion patients dies; between nine and ten weeks, one out of every 500,000 patients dies; between thirteen and fifteen weeks, one out of every 60,000 dies; and after twenty weeks, the likelihood of death increases to one in 11,000. The Institute based its abortion mortality statistics on surveillance conducted by the Centers for Disease Control and Prevention, which count all deaths associated with abortion, not just those attributed to abortion, and “include significantly more abortion-related deaths than are reported on death certificates.” *Id.*

²⁶ See *Surgical Abortion Procedures*, American Pregnancy Association, <http://www.americanpregnancy.org/unplannedpregnancy/surgicalabortions.html> (hereinafter “*Surgical Abortion Procedures*”) (last visited April 30, 2006) (noting vacuum aspiration is also known as suction curettage and suction aspiration).

²⁷ See *Stenberg*, 530 U.S. at 923 (explaining the vacuum aspiration procedure, during which the physician inserts a vacuum tube into the pregnant woman’s uterus to evacuate its contents).

progresses, vacuum aspiration becomes less feasible.²⁸ Therefore, physicians use several other abortion procedures later in pregnancies.

1. *Dilation and Evacuation*

Dilation and Evacuation (“D&E”) is the most common abortion procedure performed during the second trimester.²⁹ During a D&E, the physician first dilates the woman’s cervix.³⁰ The woman does not have to remain at the clinic while her cervix is dilating, but can instead spend the night at home or participate in her normal daily activities.³¹ When her cervix achieves the necessary dilation, the physician sedates the woman. The doctor places forceps in the uterus and grasps the fetus. The physician then removes the fetus by pulling it through the cervix and vagina. Pulling the fetus out of the woman’s body often causes the fetus to come apart, and the physician must perform ten to fifteen passes through the uterus with the forceps to ensure

²⁸ *Id.* at 924 (“As the fetus grows in size ... the vacuum aspiration procedure becomes increasingly difficult to use.”).

²⁹ *Stenberg*, 530 U.S. at 924; *see also Planned Parenthood*, 320 F. Supp. 2d at 961 (citing trial evidence to conclude that D&Es make up ninety-five percent of all abortions performed between sixteen and twenty weeks of pregnancy and eighty-five percent of all abortions after twenty weeks of pregnancy).

³⁰ *See Surgical Abortion Procedures*, *supra* note 26 (dilating the cervix occurs about twenty-four hours before the physician performs the procedure); *see also Planned Parenthood*, 320 F. Supp. 2d at 961 (elaborating that doctors generally try to achieve only two centimeters of dilation for a twenty week old fetus whereas a full-term birth requires a ten centimeter dilation).

³¹ *See Planned Parenthood*, 320 F. Supp. 2d at 961 (citing trial testimony from physicians who perform D&Es).

removal of all fetal parts.³² A normal D&E lasts approximately ten to fifteen minutes.³³ Some, but not all physicians ensure fetal demise before the outset of the procedure.³⁴

While the risks associated with D&Es are rare, they may include damage to uterine lining or cervix, perforation of the uterus, or infection.³⁵ Perforation of the uterus or nearby organs can occur due to the presence of instruments in the uterus or from sharp fetal bone fragments, particularly as gestation progresses and fetal bones harden.³⁶ Also, if fetal tissue is left in the uterus following a D&E, it can cause infection or other complications.³⁷

³² *See id.* at 962 (citing testimony of numerous physicians at trial). *But see Surgical Abortion Procedures, supra* note 26 (describing the procedure somewhat differently, as involving the insertion of medical instruments to remove tissue away from the uterine lining, scraping the lining, and only using forceps if needed to remove larger parts).

³³ *See Planned Parenthood, 320 F. Supp. 2d* at 962 (making note of physician testimony of a time range anywhere from five to forty minutes); *see also Surgical Abortion Procedures, supra* note 26 (reporting a D&E normally takes thirty minutes).

³⁴ *See Planned Parenthood, 320 F. Supp. 2d* at 962 (observing expert testimony that before beginning the procedure they regularly inject a substance directly into the fetus' heart or into the amniotic fluid surrounding the fetus before conducting the D&E in order to effect fetal demise).

³⁵ *Surgical Abortion Procedures, supra* note 26

³⁶ *Carhart, 331 F. Supp. 2d* at 920-21.

³⁷ *Id.*

2. Induction

The second most common form of abortion performed during the second trimester is induction.³⁸ Physicians may prefer inductions to other procedures because they often result in the delivery of an intact fetus, which may allow for a fetal autopsy.³⁹

To conduct an induction, the physician gives the woman medication to induce labor and expel the fetus.⁴⁰ Induction abortions take between six and forty-eight hours to complete, and occasionally involve a supplemental D&E.⁴¹ Doctors must perform inductions in a hospital because the potential risks to the woman's health are greater than with D&Es.⁴²

³⁸ See *Planned Parenthood*, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 9775 at *10-11

(indicating that inductions account for approximately five percent of all fourteen to twenty week pregnancies and approximately fifteen percent of abortions performed after twenty weeks of pregnancy).

³⁹ See *id.* at *12 (suggesting that a woman who is aborting an abnormal fetus may want an autopsy performed in order to determine the cause of the problem and therefore if she will face risk of the same problems with future pregnancies).

⁴⁰ See *id.* at *11 (noting that the body is not inclined to expel the fetus during the second trimester of pregnancy and therefore the physician must artificially induce contractions using medication).

⁴¹ See *id.* at *12 (explaining that a D&E may be necessary with an induction if unexpelled matter, such as the placenta, remains in the uterus).

⁴² See *id.* at *12 (explaining that an induction requires constant supervision by a physician for at least twenty-four hours).

3. *Dilation and Extraction*

Dr. Martin Haskell coined the term Dilation and Extraction (“D&X”) in a presentation on second trimester abortions at a 1992 National Abortion Federation Seminar.⁴³ D&Xs are a variation of D&Es in which the fetus stays intact as the physician removes it from the uterus.⁴⁴ At approximately twenty weeks, fetal tissues become tough and difficult for the physician to dismember while the fetus is inside the uterus.⁴⁵

As with D&Es, physicians performing D&Xs first dilate the woman’s cervix. But when the physician removes the fetus through the cervix, the fetus remains intact.⁴⁶ Because the fetus is removed from the uterus intact, it is typically done in one pass rather than several, as with D&Es.⁴⁷ There are two ways to perform a D&X depending on the position of the fetus in the womb. If the fetus is positioned head down, the doctor collapses the skull, removes the tissue from the skull to allow it to pass through the birth canal, and pulls the fetal body through the

⁴³ See Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, National Abortion Federation Risk Management Seminar: Second Trimester Abortion from Every Angle, 26 (Sept. 13, 1992) (explaining the D&X procedure).

⁴⁴ *Planned Parenthood*, 320 F. Supp. 2d at 964.

⁴⁵ See Haskell, *supra* note 43 at 28 (indicating that because of the difficulty of dismemberment, physicians often perform induction abortions at this later stage of pregnancy). To perform an induction, the physician gives the woman medication to induce labor and expel the fetus. This requires full dilation of her cervix and is riskier to the woman’s health than D&Es or D&Xs. *Planned Parenthood*, 320 F. Supp. 2d at 962-63.

⁴⁶ *Stenberg*, 530 U.S. at 927.

⁴⁷ *Id.*

cervix. If the fetus presents in the breech position (feet first), the doctor pulls the fetal body through the cervix, then collapses the skull and extracts the fetus through the cervix.⁴⁸

Collapsing the skull is necessary because there is usually insufficient dilation for the head to pass through the cervix.⁴⁹

Though there are risks associated with D&Xs, the *Stenberg* Court found that the procedure has fewer risks than D&Es.⁵⁰ First, an intact fetus does not have sharp bone fragments that could damage or perforate organs in the pregnant woman's body. Likewise, reducing the number of times the physician passes through the uterus with the forceps diminishes the chance of damaging nearby organs. D&X procedures also reduce the chance that fetal or placental tissue will remain in the woman's uterus and cause infection or potentially fatal absorption of fetal tissue.⁵¹

4. *Hysterotomy and Hysterectomy*

Hysterotomy and hysterectomy are two other methods of second trimester abortion but physicians perform them only when necessary due to health emergencies.⁵² A hysterotomy

⁴⁸ *Id.*

⁴⁹ *See Haskell, supra* note 43 at 30 (explaining that the fetal skull lodges at the opening of the cervix since it cannot pass through).

⁵⁰ *See Stenberg, 530 U.S. at 928-29* (citing the district court's conclusion that Dr. "Carhart's D&X procedure is superior to, and safer than, the ... other abortion procedures used during the relevant gestational period").

⁵¹ *Stenberg, 530 U.S. at 928-29.*

⁵² *See id.* at *13 (quoting witnesses and evidence from trial indicating that hysterotomy and hysterectomy are virtually not options as abortion procedures because of their high rates of

involves the surgical removal of the fetus through an incision in the uterus.⁵³ A physician performing a hysterectomy removes the woman's entire uterus, including the fetus.⁵⁴

B. Abortion Jurisprudence.

Abortion was legal in the United States until the 1850's, at which time the American Medical Association (hereinafter "AMA") began an antiabortion campaign that resulted in the criminalization of abortion in virtually every U.S. state and territory.⁵⁵ In the mid-twentieth

mortality and morbidity, and therefore recommending that they only be used to save the life or health of the woman)

⁵³ *See id.* (comparing a hysterotomy to a caesarean delivery).

⁵⁴ *See id.* (stating that hysterotomy and hysterectomy make up approximately .01% of all abortions and .07% of second trimester abortions).

⁵⁵ *See* National Abortion Federation, *Roe v. Wade and the History of Abortion in America* (noting that women have had abortions for thousands of years in most societies and describing the AMA's anti-abortion campaign and its reliance on arguments labeling abortion both unsafe and immoral) at http://www.prochoice.org/about_abortion/history_abortion.html (last accessed December 16, 2005). The AMA's actual motivations, however, were more closely aligned to the eugenics movement. *See* Kevin Begos, *Benefactor With A Racist Bent, Against Their Will: North Carolina's Sterilization Program*, at <http://againsttheirwill.journalnow.com/> (last accessed December 16, 2005). Like the eugenics movement, restricting access to abortion was seen as a way to encourage certain women to reproduce and prevent the increasing immigrant population from having a higher birthrate than "native Anglo-Saxon women." *See also* ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES 1* (2001) (outlining abortion history before 1973).

century, the women's movement initiated a campaign to end the criminalization of abortions due to the large number of deaths and serious injuries resulting from illegal abortions.⁵⁶ In the 1960's and 1970's, states began eliminating statutes prohibiting abortion.⁵⁷ In 1973, the Supreme Court declared statutes that banned abortion outright unconstitutional.⁵⁸

1. *Women Have a Fundamental Right to Terminate their Pregnancies.*

In the landmark 1973 case *Roe v. Wade*,⁵⁹ the Supreme Court established that the Fourteenth Amendment protects a woman's fundamental right to have an abortion based on her right of personal privacy.⁶⁰ However, the woman's interest in her right to choose an abortion is a qualified one because the state also has legitimate interests related to a woman's pregnancy.⁶¹

⁵⁶ See National Abortion Federation, *supra* note 34 (noting that the vast majority of women who needed abortions before abortion became legal had no choice but to get them from illegal practitioners). These "back-alley" abortions were dangerous and often deadly procedures. *Id.*

⁵⁷ See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME 2* (1997) (noting the decriminalization of abortion at the state level in the mid-1960's and early 1970's).

⁵⁸ *Roe*, 410 U.S. at 153-54.

⁵⁹ *Id.*

⁶⁰ *Id.* at 153; see U.S. CONST. amend. XIV, § 1 (declaring that no state will deprive any person of life, liberty, or property without due process of law); see also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a fundamental right of privacy in the penumbras and emanations of the Bill of Rights).

⁶¹ See *Roe*, 410 U.S. at 177-78.

First, the state has a legitimate and important interest in preserving and protecting a pregnant woman's health.⁶² Second, the state has an interest in protecting the potentiality of human life.⁶³

When a state's interest rises to the level of compelling, the state could restrict abortion.⁶⁴ The state's interest in protecting the mother's health became compelling at the end of the first trimester.⁶⁵ The state's interest in the potentiality of the fetus was compelling when the fetus achieves viability.⁶⁶

⁶² *See id.* at 149, 162 (acknowledging that states justified abortion restrictions in the past because abortions were hazardous to women's health until around the 1940's). However, the Court recognized that modern medical techniques had lowered the risk of abortion and thus diminished the state's concern with regulating abortion on the basis of protecting women's health. *Id.*

⁶³ *See id.* at 150 (addressing the claim that a new human life begins at the moment of conception). The Court did not define the point in a pregnancy at which a new human life begins but instead stated that such a decision is not relevant to the debate because the state always has an interest in the fetus's potential human life. *Id.*

⁶⁴ *See id.* at 154-55 (quoting *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969)) (invoking earlier Supreme Court decisions holding that a state may only regulate fundamental rights when a compelling state interest justified the limitations of the rights and the regulation was narrowly tailored).

⁶⁵ *See id.* at 150, 163 (explaining that the risk to the pregnant woman increases as her pregnancy progresses, but until the end of the first trimester, mortality in abortion is less than mortality in normal childbirth).

⁶⁶ *Id.* at 162-64.

Roe introduced a trimester framework to balance the competing interests of the pregnant woman and the state. During the first trimester, the state could not restrict abortion because the state's interests were not compelling in either maternal health or in the potential life of the fetus.⁶⁷ During the second trimester, the state could only regulate abortions in a manner that was reasonably related to protecting and preserving the woman's health.⁶⁸ During the third trimester, states could regulate and even proscribe abortion due to their compelling interest in the potentiality of human life. The Court required such statutes, however, to contain exceptions where the pregnant woman's health or life was in danger.⁶⁹

⁶⁷ *Id.* at 164.

⁶⁸ *See id.* at 162-63 (allowing regulation of abortion during the second trimester only if the regulation relates to the woman's well-being because before it has a compelling interest in the fetus, the state's only justification for regulating abortion is its compelling interest in maternal health).

⁶⁹ *Id.* at 164-65.

2. *Statutes Restricting Abortion May Not Impose An Undue Burden On A Woman's Right To Terminate Her Pregnancy.*

In *Planned Parenthood v. Casey*,⁷⁰ the Court affirmed *Roe*'s essential principles, but also refined *Roe*'s analysis of abortion regulation.⁷¹ Though the Court noted that restricting a woman's right to terminate her pregnancy uniquely threatens her liberty because pregnancy involves such an intimate and personal sacrifice, the Court also concluded a state could regulate or restrict abortions at any point during the pregnancy because the Court found that the state had an interest in protecting potential life throughout the pregnancy.⁷² But, the Court emphasized that the state's interests in protecting both the woman's health and the potential life of the fetus did not outweigh the woman's right to end her pregnancy prior to viability. The Court held that before her fetus is viable, a woman has a fundamental right to have an abortion without undue

⁷⁰ See 505 U.S. 833, 872 (1992) (analyzing the constitutionality of the Pennsylvania Abortion Control Act of 1982 under the guidance of *Roe*'s holding). The Court upheld three requirements in the Act that a woman must satisfy before she can obtain a legal abortion: (1) she must provide her informed consent to have the abortion at least twenty-four hours after receiving certain information, (2) she must either have the informed consent of her parents if she is a minor or get an exception from a judge, and (3) she must sign a statement swearing that she informed her husband she was going to have an abortion unless certain exceptions apply. *Id.*

⁷¹ See *id.* at 844 (finding the trimester framework too "rigid" because it sometimes conflicts with a state's interests in protecting fetal and maternal life).

⁷² See *id.* at 877-78 (indicating that a woman's right to terminate her pregnancy does not imply a right to make her choice free from outside influence). The state may impose abortion regulations encouraging a woman to carry her child to term rather than terminate her pregnancy. *Id.*

influence from the state. The Court defined an abortion restriction that constituted an undue burden as one that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.⁷³ After viability, states may restrict abortions in any way so long as the restrictions contained exceptions that protected both the life and health of the woman.⁷⁴

3. *A Statute Restricting Partial Birth Abortions Is Unconstitutional Where It Imposes An Undue Burden And Does Not Include An Exception For The Pregnant Woman's Health.*

In *Stenberg v. Carhart*,⁷⁵ the Supreme Court found a Nebraska statute banning partial-birth abortions unconstitutional. The Nebraska statute prohibited all partial-birth abortions except when the pregnancy endangered the mother's life.⁷⁶ The statute defined partial-birth abortion as "a procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."⁷⁷ The Court in *Stenberg* reiterated the *Roe* and *Casey* holdings and found the Nebraska statute

⁷³ *Id.* at 877.

⁷⁴ *Id.* at 879.

⁷⁵ 530 U.S. at 945-46.

⁷⁶ *See* Partial Birth Abortion; prohibition; violation; penalties, NEB. REV. STAT. ANN. § 28-326(9) (2000) (making the performance of a partial-birth abortion a Class III felony unless the procedure is necessary to save the mother's life where a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself threatens her life).

⁷⁷ *Id.*

unconstitutional.⁷⁸ Specifically, the Court struck down the Nebraska statute because it did not have a health exception and it imposed an undue burden on a woman's choice to have an abortion.⁷⁹ The Court declared the Nebraska statute's ban created an undue burden because its definition of "partial-birth abortion" effectively prohibited the most common second trimester abortion procedure, D&Es.

4. *The Partial Birth Abortion Ban Act of 2003.*

The Partial-Birth Abortion Ban Act became law on November 6, 2003.⁸⁰ Congress attempted multiple times without success to restrict the use of "partial-birth abortions" prior to the passage of the Act.⁸¹ The Act subjects a physician who "knowingly performs a partial-birth abortion" to civil and criminal penalties. The Act defines "partial-birth abortions" as abortions in which the person performing the abortion "deliberately and intentionally vaginally delivers a living fetus" until either (1) its entire head or (2) its legs and lower torso including the navel are

⁷⁸ See *Stenberg*, 530 U.S. at 921 (reiterating the Court's three established principles concerning abortion litigation, (1) before viability a woman has a right to terminate her pregnancy, (2) a law is unconstitutional if it places an undue burden on a woman's right to choose an abortion before fetal viability, and (3) following viability, because of its interest in potential human life, the state may regulate or prohibit abortion except where it is necessary to preserve the health and life of the woman). The Supreme Court held that the Nebraska statute contravened numbers one and two above. *Id.*

⁷⁹ *Id.* at 938.

⁸⁰ 18 U.S.C. § 1531.

⁸¹ See *Planned Parenthood*, 320 F. Supp. 2d at 1014 (observing that Congress held six hearings relating to "partial-birth abortion" between 1995 and 2003).

outside the pregnant woman's body, for the purpose of performing an overt act that the person knows will and does in fact kill the fetus.⁸² The only exception in the Act is where the physician performed the procedure to save the mother's life.⁸³ The Act does not impose penalties on the women who undergo the procedure.

5. *Three United States District Courts And Three Federal Courts of Appeals Have Found The Act Unconstitutional.*

The United States District Court for the Northern District of California enjoined enforcement of the Act in June 2004.⁸⁴ Within the next several months, the United States District Courts for the Southern District of New York and the District of Nebraska also declared the Act unconstitutional.⁸⁵ In July 2005, the Eighth Circuit affirmed the Nebraska decision.⁸⁶ On January 31, 2006, the Second and Ninth Circuits also found the Act unconstitutional.⁸⁷

⁸² 18 U.S.C. § 1531.

⁸³ *See* 18 U.S.C. § 1531 (noting that a physician is someone legally authorized to practice medicine, but that the Act may also impose penalties on other persons not legally authorized to practice medicine who perform the acts defined as "partial-birth abortions").

⁸⁴ *Planned Parenthood*, 320 F. Supp. 2d at 1035.

⁸⁵ *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 493 (S.D.N.Y. 2004) (hereinafter "*Nat'l Abortion Fed'n*"); *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957, 1034-35 (N.D.Cal. 2004) (hereinafter "*Planned Parenthood*").

⁸⁶ *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

⁸⁷ *Nat'l Abortion Fed'n II*, 437 F.3d at 278; *Planned Parenthood II*, 435 F.3d at 1163.

The *Planned Parenthood* court held that the Act violated *Roe*, *Casey*, and *Stenberg* standards for abortion regulations on three grounds.⁸⁸ First, it imposes an undue burden on a woman’s right to terminate her pregnancy before viability because the Act restricts second trimester abortion procedures other than just D&Xs, which amounts to potentially prohibiting eighty-five to ninety-five percent of all second trimester abortions.⁸⁹ Second, the court found that the Act was void for vagueness because it did not sufficiently define the prohibited procedures and because the medical community does not recognize terminology used in the statute, such as “partial-birth abortion,” “living fetus,” and “overt act.”⁹⁰ Third, the court found the Act did not contain an exception allowing women to have abortions when their health was in danger.⁹¹ The New York district court reiterated the Supreme Court’s *Stenberg* holding that a legislative ban on D&X abortions was only constitutional where it included an exception for the

⁸⁸ 320 F. Supp. 2d at 973.

⁸⁹ *Id.* at 973-74.

⁹⁰ *Id.* at 977.

⁹¹ Compare 18 U.S.C. § 1531 (stating that a “partial-birth abortion” is never medically necessary to preserve the health of the pregnant woman), with *Stenberg*, 530 U.S. at 932 (asserting that significant medical authority demonstrates that in some instances, D&X is the safest abortion procedure and noting that in some cases a D&X is best for the woman’s health); see also *Planned Parenthood*, 320 F. Supp. 2d at 492-93 (finding the Congressional determination in the Act that a D&X is never medically necessary “unreasonable and not supported by substantial evidence”).

pregnant woman's health.⁹² The Nebraska court declared the Act unconstitutional, in part, because it does not include a health exception, but the court found only pre-viability abortions unconstitutional.⁹³ The Eighth Circuit found the Act unconstitutional because it did not contain a health exception.⁹⁴

II. THE ACT IS UNCONSTITUTIONAL.

To withstand constitutional scrutiny, abortion legislation must comply with the constitutional requirements for all statutes⁹⁵ and the common law established by the Supreme Court in *Roe*, *Casey*, and *Stenberg*.⁹⁶ The Act fails in both respects.⁹⁷

⁹² See *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 492-93 (ruling the ban may only survive without an exception if there is a medical consensus that there is no circumstance in which a woman would benefit from a D&X). The court continued by stating that there is a "diversion of medical opinion" as to the safety of partial-birth abortion; therefore the Act must have a health exception to withstand constitutional scrutiny. *Id.*

⁹³ See *Carhart*, 331 F. Supp. 2d at 808, 886-88 (finding that the Act does not allow, but rather prohibits partial birth abortions when one is necessary to preserve the pregnant woman's health). The court also found the Act is unconstitutionally vague and prohibits D&E abortions, thus it fails the undue burden test. *Id.*

⁹⁴ *Carhart II*, 413 F.3d at 803 (declining to address the district court's holding that the Act also constituted an undue burden).

⁹⁵ See *infra* notes 102-133 (explaining the Act is void for vagueness).

⁹⁶ See *supra* notes 55-96 (tracing the history of abortion jurisprudence and explaining current law).

When evaluating health legislation, the Court will begin by ascertaining the legislature’s intent when it created the regulation.⁹⁸ The Court will first examine the statute’s plain language to determine if the words unequivocally express the legislature’s intent.⁹⁹ If the wording of the legislation is clear, the Court “should not add or alter it to accomplish a purpose that does not appear on the face of the statute.”¹⁰⁰ The Court should construe the Act as it finds it, not as the Court thinks the Act could or would “be improved by the inclusion of other provisions.”¹⁰¹ The Court presumes the legislature that enacted the statute had knowledge of existing law. If the Court determines part of the statute is unconstitutional, the Court may sever the unconstitutional portion and allow the valid portion to stand.¹⁰²

⁹⁷ See *Planned Parenthood*, 320 F. Supp. 2d at 973-74 (finding the Act unconstitutionally vague because it does not indicate clearly to physicians which abortion procedures are proscribed). The Act also fails the *Casey* standard because it imposes an undue burden on a woman’s right to choose an abortion during her second trimester because it prohibits virtually all second trimester abortion procedures. *Id.*

⁹⁸ Norman J. Singer, Application of the Rules of Statutory Construction in Selected Areas of Substantive Law: Health Legislation, 3A Sutherland Statutory Construction § 74:5, n.5 (6th ed.) (hereinafter “Construction of Health Legislation”).

⁹⁹ See Construction of Health Legislation, *supra* note 98 (citing *American Society of Cataract and Refractive Surgery v. Thompson*, 279 F.3d 447 (7th Cir. 2002); *Glaxo Group Ltd. v. Apotex, Inc.*, 272 F. Supp. 2d 772 (S.D. Ill. 2003)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

A. The Act is Void for Vagueness Because it Does Not Define the Prohibited Procedure Sufficiently to Put Practitioners on Notice of What the Act Prohibits and to Prevent Arbitrary Enforcement.

The Court nullifies a statute as vague where its language lacks specificity such that it: (1) encourages arbitrary and discriminatory enforcement, or (2) an ordinary person of common intelligence cannot easily comprehend and comply with its restrictions.¹⁰³ Courts will scrutinize statutes that impose criminal penalties or implicate a constitutional right even more closely than other statutes.¹⁰⁴ The Court held, “[i]n a facial vagueness challenge, the ordinance need not be

¹⁰³ See, e.g., *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir.1997) (mandating that a law must define a prohibited offense with sufficient clarity for ordinary people to understand what is forbidden and establish standards so that those enforcing the law may do so in a way that does not discriminate); *Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982) (“[C]omplainant must prove that the enactment is vague ‘not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971))); *Broadrick v. Oklahoma*, 413 U.S. 601, 607-08 (1973) (finding statute constitutional because it gave an adequate description of the prohibited activities); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (noting it is a basic principle of due process that a statute is void for vagueness if people cannot understand easily what acts it prohibits); *Planned Parenthood*, 320 F. Supp. 2d at 976 (basing the requirement for clear definitions or prohibited behavior on the ability of persons to choose to act lawfully rather than unlawfully).

¹⁰⁴ See *Winters v. New York*, 333 U.S. 507, 515 (1948) (remarking that the Court has invalidated criminal statutes on their face even when they might have had some conceivably valid application) (citing *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*,

vague in all applications if it reaches a ‘substantial amount of constitutionally protected conduct.’”¹⁰⁵

1. *The Act is Void Because it Does Not Define the Prohibited Procedure Adequately to Allow Doctors to Avoid Performing the Banned Procedure and Law Enforcement to Implement the Ban Uniformly.*

The Act’s language is not sufficiently clear to allow doctors who perform abortion procedures to avoid performing the banned procedure.¹⁰⁶ The Act contains several phrases that do not have medical significance; therefore it does not comport with the Due Process Clause’s requirements.¹⁰⁷

First, the Act’s use of the term “partial-birth abortion” is unconstitutionally vague.¹⁰⁸ Physicians report that the term partial-birth abortion “has little if any medical significance.”¹⁰⁹

306 U.S. 451 (1939); *see also Planned Parenthood II*, 435 F.3d at 1181 (citing *Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir.2000) (as amended)).

¹⁰⁵ *Nunez by Nunez*, 114 F.3d at 940; *see also Hoffman Estates*, 455 U.S. at 495

¹⁰⁶ *See Planned Parenthood*, 320 F. Supp. 2d at 977 (citing testimony from physicians stating that they could not determine exactly which abortion procedures the Act proscribes).

¹⁰⁷ *See Planned Parenthood II*, 435 F.3d at 1181-82 (concluding that even without the other reasons for the Act’s unconstitutionality, the Act’s vagueness is an independent ground for finding it unconstitutional); *Planned Parenthood*, 320 F. Supp. 2d at 977 (citing testimony of abortion physicians that they do not understand some language in the Act and therefore cannot be sure which procedures it requires them to avoid).

¹⁰⁸ *See id.* (mentioning that legislators in Congress noted the term has no medical or legal meaning and instead it has only a political connotation).

¹⁰⁹ *Id.*

Because the term does not have a medical meaning or definition, the Act's use of it does not make clear to physicians which abortion procedures the Act forbids them from performing.¹¹⁰

Without a clear understanding of what procedure is prohibited, physicians cannot make a choice to act lawfully rather than unlawfully.¹¹¹ Because it does not provide for such a choice, the Act is unconstitutionally vague.¹¹²

Second, the Act's use of the phrase "living fetus" is vague because it is not relevant to the Court's framework for analyzing abortion legislation, namely, the emphasis on viability.¹¹³ By

¹¹⁰ *See id.* at 977 (citing testimony of abortion physicians).

¹¹¹ *See Grayned*, 408 U.S. at 108 (finding that where an actor cannot make a choice between lawful and unlawful behavior, a statute may trap innocent people because it does not provide fair warning).

¹¹² *See Planned Parenthood*, 320 F. Supp. 2d at 977 (concluding that the Act is void for vagueness because prohibiting "partial-birth abortions" does not define with specificity for physicians what procedures it prohibits). Therefore, physicians cannot make a meaningful choice between lawful and unlawful behavior. *Id.*

¹¹³ *See id.* (stating that because the Act uses the term "living fetus," it fails to distinguish between procedures it prohibits and procedures it allows at viability); *see also Casey*, 505 U.S. at 846 (finding that the point at which an abortion regulation become constitutional is the point at which a fetus achieves viability because only after viability does the state's interest outweigh the woman's fundamental right to terminate her pregnancy).

using the term “living fetus” rather than “viable fetus,” the Act does not limit its abortion restrictions to only those fetuses in which the state has a compelling interest.¹¹⁴

Third, requiring an “overt act” to effect fetal demise does not sufficiently narrow the scope of the Act to satisfy the vagueness test because it may prohibit abortion procedures other than solely D&Xs.¹¹⁵ Using the phrase “overt act” does not indicate to physicians which particular acts it forbids.¹¹⁶ Further, because the D&E and D&X procedures are similar in their performance, the phrase also does not limit the proscriptions to acts performed during a D&X rather than D&E.¹¹⁷ Rather, “overt acts” may comprise many different acts a physician may perform during the course of D&Es, inductions, or D&Xs.¹¹⁸

¹¹⁴ See *Planned Parenthood*, 320 F. Supp. 2d at 977 (assessing the vagueness of the term “living fetus” due to its failure to distinguish between a pre- and post-viable fetus because a fetus that is not viable is nevertheless “living” if it has a detectable heartbeat or pulsating umbilical cord).

¹¹⁵ See *Planned Parenthood*, 320 F. Supp. 2d at 977 (concluding that the term “overt act” cuts such a wide swath that it does not alert physicians as to what particular acts violate the Act).

¹¹⁶ See *id.* (finding that the term “overt act” does not give physicians notice of what type of abortion procedure the Act prohibits).

¹¹⁷ Compare *id.* at 965 (explaining that the ACOG subsequently coined the term “intact D&X,” which it defined as 1) dilation of the cervix, 2) inversion of the fetus to a breech position, 3) breech extraction of the fetus up to the calvarium, and 4) extraction of the inside of the fetal head to allow vaginal delivery of a dead, intact fetus), with *Planned Parenthood*, 320 F. Supp. 2d at 962 (describing D&E procedures, in which the doctor places forceps in the uterus, grasps the fetus with the forceps, and removes it from the woman’s body by pulling it through the cervix and vagina).

2. *The Act is Void for Vagueness Because it Does Not Distinguish Between Pre- and Post-Viability Abortions.*

Because the Act does not refer to fetal viability, it is unclear whether it restricts abortions only post-viability, or both pre- and post-viability.¹¹⁹ The state has a weaker interest in the life of the fetus prior to viability.¹²⁰ Due to this diminished interest, the state has less leeway when restricting pre-viability abortions than when restricting post-viability abortions, and must satisfy the *Casey* undue burden standard.¹²¹ Like the Act, the Nebraska statute at issue in *Stenberg* did not indicate the point in time during the pregnancy at which it banned the defined abortion procedure.¹²² The *Stenberg* Court found that because the statute did not specify at which gestational point it came into effect, it applied to both pre- and post-viability abortion

¹¹⁸ *See id.* (observing that the term “overt act” may include acts performed in D&Es, D&Xs, and inductions, such as disarticulation of the calvarium, cutting the umbilical cord, or compressing the fetal abdomen or skull when it is obstructing the evacuation of the uterus).

¹¹⁹ *See Planned Parenthood*, 320 F. Supp. 2d at 971 (finding that Congress rejected alternatives and amendments to the Act which would have limited its applicability only to viable fetuses).

¹²⁰ *See Casey*, 505 U.S. at 846 (reiterating a woman’s fundamental right to have an abortion before fetal viability but confirming the state’s ability to restrict abortions after viability).

¹²¹ *See Stenberg*, 530 U.S. at 930 (mandating at minimum the same requirements for pre-viability abortions those requirements that are held for post-viability abortions); *Casey*, 505 U.S. at 846 (articulating the standard for evaluation statutes that restrict pre-viability abortions).

¹²² *See* 18 U.S.C. § 1531 (failing to mention any time constraints concerning when the Act prohibits the described abortion procedure).

procedures.¹²³ The Court found the *Stenberg* statute unconstitutional because it imposed an undue burden on a woman’s right to terminate her pregnancy prior to viability; the Court did not address the vagueness issue.¹²⁴ More recently, the Court of Appeals for the First Circuit held a partial birth abortion statute unconstitutionally vague because the statute applied to both pre- and post-viability abortion procedures.¹²⁵ Since the Act also does not refer to a specific time in fetal development either, the Act likewise restricts abortion pre- and post-viability, and is also unconstitutionally vague for that reason.¹²⁶

3. *The Act’s Scierter Requirements are Insufficient to Cure the Act’s Vagueness.*

Where a statute includes scierter requirements allowing a court to construe it more narrowly, a court may find the act statute constitutional.¹²⁷ However, scierter requirements are

¹²³ See *Stenberg*, 530 U.S. at 930 (finding that a statute must have at least the same constraints the Court established for post-viability abortions when courts may also interpret that it bans pre-viability abortions).

¹²⁴ See *id.* at 945-46 (articulating that the statute constituted an undue burden because it restricted D&Es as well as D&Xs).

¹²⁵ See *RI Med. Soc. V. Whitehouse*, 239 F.3d 104 (1st Cir. 2001), reh’g and suggestion for reh’g en banc denied, (Mar. 16, 2001).

¹²⁶ See *Planned Parenthood*, 320 F. Supp. 2d at 971 (finding that because the Act refers only to a “living fetus” rather than a “viable fetus,” it restricts both pre- and post-viability abortions).

¹²⁷ See *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) (acknowledging that scierter requirements may mitigate a statute’s vagueness so that a court may find it constitutional); see also *Planned Parenthood*, 320 F. Supp. 2d at 975 (concluding that the Act is

irrelevant to constitutionality where they serve only to restrict an already vaguely-defined procedure.¹²⁸ The government in the California cases argued the courts should find three scienter requirements sufficiently narrow the Act so as to mitigate its vagueness and render it constitutional.¹²⁹ The Ninth Circuit properly affirmed the Northern District of California's finding the scienter requirements fail to cure the Act's vagueness because they do not impose any clarifying limits on the statute since the intent with which one commits a banned procedure is irrelevant where the procedure has no meaningful definition.¹³⁰

vague because the potentially narrowing construction directly contradicts the Act's explicit statutory definition of partial birth abortion).

¹²⁸ *Planned Parenthood II*, 435 F.3d at 1179-80; *Planned Parenthood v. Farmer*, 220 F.3d 127, 138 (3d Cir. 2000); *Planned Parenthood v. Miller*, 195 F.3d 386, 389 (8th Cir. 1999)); *See Planned Parenthood*, 320 F. Supp. 2d at 975-76.

¹²⁹ *See Planned Parenthood*, 320 F. Supp. 2d at 975-76 (describing the government's argument that the phrases "knowingly performs," "deliberately and intentionally," and "for the purpose of" mitigate the Act's vagueness because they result in the prohibition only of D&Xs and not other abortion procedures).

¹³⁰ *See Planned Parenthood II*, 435 F.3d at 1179-80 (explaining why the scienter requirements do not cure the Act's constitutional infirmity); *Planned Parenthood*, 320 F. Supp. 2d at 975-76 ("At a minimum, to limit the scope of a statute to 'deliberately and intentionally' performing a certain procedure, the procedure itself must be identified or readily susceptible of identification") (quoting *Planned Parenthood v. Farmer*, 220 F.3d 127, 138 (3d Cir. 2000); citing *Planned Parenthood v. Miller*, 195 F.3d 386, 389 (8th Cir. 1999)).

The government’s arguments that the Act’s scienter requirements adequately restrict its scope depends on the premise that by applying the scienter requirements the Act’s description of the prohibited procedure is limited only to D&Xs.”¹³¹ The Ninth Circuit pointed out that is “simply not the case.”¹³² The requirement that a physician “knowingly” or “deliberately and intentionally” perform a “partial-birth abortion” does not adequately narrow the Act because “partial-birth abortion” does not identify a specific procedure. A physician who begins a D&E or an induction *always knows* he or she may have to perform an D&X.¹³³ Since physicians always know there is such a possibility, including the language “knowingly” utterly fails limit the Act’s scope. Likewise, the requirement that a physician “deliberately and intentionally vaginally deliver a living fetus” also has no meaningful application that might cure the constitutional vagueness by clarifying the type of procedure the Act prohibited because in the vast majority of abortion (and for that matter birthing) procedures, the physician will deliver the fetus out through the vagina. In order for any phrase to sufficiently narrow the scope of the Act, physicians must be able to readily identify the prohibited procedure itself.¹³⁴

¹³¹ *Planned Parenthood II*, 435 F.3d at 1179-80.

¹³² *Id.*

¹³³ *See id.* at 977-78 (citing trial testimony from abortion physicians that a physician may have to change to a different procedure in the middle of performing the abortion in order to ensure the pregnant woman’s health and safety).

¹³⁴ *See id.* (concluding that the language of the Act does not clearly identify the prohibited procedure because it does not use terminology with medical significance); *see also Farmer*, 220 F.3d at 140 (rejecting New Jersey partial-birth abortion ban because the statute did not name the procedure or use its the medical definition); *Little Rock Family Planning Services v. Jegley*, 192

B. The Act Fails the Undue Burden Test Because it Restricts the Most Common Second Trimester Abortion Procedure and Applies to Pre- and Post-Viability Abortions.

According to the undue burden test articulated by Justice O'Connor in *Casey*, the Act is unconstitutional if its restrictions on pre-viability abortions impose an undue burden on a woman's ability to choose to terminate her pregnancy.¹³⁵ An abortion restriction constitutes an undue burden if it places a substantial obstacle in the way of a woman's choice to terminate her pregnancy.¹³⁶

1. *The Undue Burden Analysis Applies Because The Act Restricts Pre-Viability Abortions.*

Because the Act's language is ambiguous, it restricts both pre- and post-viability abortions. The undue burden test only applies if the statute restricts abortions performed prior to fetal viability.¹³⁷ In *Casey*, the Court created this framework with which to evaluate abortion legislation, centering on the point of viability.¹³⁸ The Act, however, does not refer to viability. Instead, the Act defines "partial-birth abortion" as, "an abortion in which the person performing the abortion (A) deliberately and intentionally vaginally delivers a *living fetus*."¹³⁹ A "living fetus" is irrelevant to the Court's framework for analyzing abortion legislation. A fetus is

F.3d 794 (8th Cir. 1999) (rejecting the state's argument that the scienter requirement limited the scope of the statute to prohibiting only the D & X procedure). .

¹³⁵ *Casey*, 505 U.S. at 852; *see also Stenberg*, 530 U.S. at 921, 929-30, 938 (applying *Casey* rules to late-term abortion legislation).

¹³⁶ *Casey*, 505 U.S. at 846.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 18 U.S.C. § 1531(b)(1) (emphasis added).

arguably alive from the moment it becomes a fetus after being an embryo, long before viability.¹⁴⁰ Because the statute fails to refer to viability despite the Court's repeated emphasis on viability as the turning point for evaluating abortion legislation, and the potential for the quite reasonable conclusion that a fetus is "living" long before it is viable, the Court must conclude Act applies to and thereby restricts both pre- and post-viability abortions. Because the Act applies to pre-viability abortions and the Court has held the state's interest in regulating pre-viability abortions is considerably weaker than its interest in regulating post-viability abortions and such legislation is subject to a different standard than legislation which applies to post-viability abortions, the Act must satisfy the undue burden test.

2. *The Act Unconstitutionally Imposes an Undue Burden on a Woman's Right to Terminate her Pregnancy Prior to Viability because the Act Prohibits D&E Abortions As Well As D&X Abortions, And D&E Abortions Are The Most Common Second Trimester Abortion Procedure.*

A statute fails the undue burden test where its language is not specific enough when describing the prohibited procedures to indicate that it banned only D&Xs and not other abortion procedures.¹⁴¹ Because D&Es are the most common type of second trimester abortion procedure, the Act is unconstitutional if it proscribes D&E abortions generally.¹⁴² Prohibiting D&Es prevents a woman from having virtually any abortion during her second trimester because

¹⁴⁰ *Planned Parenthood*, 320 F. Supp. 2d at 971.

¹⁴¹ *See Stenberg*, 530 U.S. at 924.

¹⁴² *See id.* at 938 (noting the government's concession that if the statute applies generally to D&Es in addition to D&Xs, it unconstitutionally imposes an undue burden on a woman's choice).

D&Es comprise such a significant number of second trimester abortions.¹⁴³ The *Stenberg* Court found that the Nebraska statute prohibited D&Es generally and because D&Es were the most common second trimester abortion procedure, the Nebraska statute placed a substantial obstacle in the path of a woman seeking an abortion during her second trimester constituting an undue burden. Because it prohibited D&Es, the Court declared the Nebraska statute at issue in *Stenberg* unconstitutional.¹⁴⁴ Numerous federal courts interpreting many different statutes have also held that if a statute bans more than the D&X procedure, it constitutes an undue burden and is consequently unconstitutional.¹⁴⁵ Therefore, if the Act bans D&Es, the Act is unconstitutional.

- a. The Slight Differences In The Act's Language, As Compared With The Language In The Unconstitutional *Stenberg* Act, Do Not Limit The Prohibition To D&Xs.

Like the Nebraska statute at issue in *Stenberg*, the Act constitutes an undue burden because it does not ban D&Xs specifically. The Act does not specifically refer to any abortion procedure. The Act does not use medical terminology, including the accepted medical names for

¹⁴³ *See id.* at 961-62 (affirming that D&Es make up ninety-five percent of all abortions taking place between sixteen and twenty weeks of pregnancy and eighty-five percent of all abortions taking place after twenty weeks of pregnancy).

¹⁴⁴ *See id.* at 939 (speculating that it would have been easy for the Nebraska legislature to provide an exception to the ban for D&E and other abortion procedures, yet it did not, and instead the language does not distinguish between a D&E and an D&X).

¹⁴⁵ *Stenberg*, 530 U.S. at 945; *Planned Parenthood II*, 435 F.3d at 1180; *Farmer*, 220 F.3d at 140; *Jegley*, 192 F.3d at 797; *Planned Parenthood*, 320 F. Supp. 2d at 971; *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997).

abortion procedures such as D&Es or D&Xs.¹⁴⁶ The Act’s language does not distinguish between D&Es and D&Xs because, as stated above, terms such as “overt act” can apply to many different abortion procedures rather than solely D&Xs. The Act, however, gives a more specific description of the prohibited procedures than the Nebraska statute at issue in *Stenberg*.¹⁴⁷

The Act differs from the Nebraska statute in three ways relevant to the Act’s constitutionality. However, none of the differences actually limit the restriction to only D&X abortions. First, the Act prohibits a procedure that requires delivery of the fetus “outside the body of the mother.”¹⁴⁸ This “outside the body of the mother” language may distinguish the D&E procedure from the D&X procedure because only with a D&X would the fetus remain intact when it was outside the woman’s body. However, this argument fails because the Act does not specify that the fetus remain intact, and all D&E and induction abortions involve delivering the fetus outside the woman’s body.¹⁴⁹

¹⁴⁶ Compare 18 U.S.C. § 1531 (prohibiting only the intentional vaginal delivery of a living fetus until a specific portion of it is outside the body of the mother followed by the performance of an overt act that the physician knows will kill the fetus), with *Stenberg*, 530 U.S. at 939 (stating that the legislature should have specifically distinguished between D&E and D&X in its restrictions).

¹⁴⁷ Compare 18 U.S.C. § 1531, with NEB. REV. STAT. ANN. § 28-326(9).

¹⁴⁸ Compare 18 U.S.C. § 1531 at (b)(1)(A) (prohibiting delivery of the entire fetal head or the fetal trunk past the navel outside the woman’s body), with NEB. REV. STAT. ANN. § 28-326(9) (proscribing the delivery into the vagina of the pregnant woman).

¹⁴⁹ See *id.* at 962-63 (explaining that the doctor removes the fetus from the woman’s body in a D&E abortion and describing how the physician expels the fetus from the woman’s body in an induction abortion).

Second, the Act specifically states which fetal parts must protrude outside the mother's body for the procedure to fall within the Act's prohibition.¹⁵⁰ This specificity regarding fetal parts outside the woman's body could arguably eliminate the ambiguity of the Nebraska statute's "substantial portion" language.¹⁵¹ The *Stenberg* Court criticized the Nebraska statute for not providing that the prohibition of the procedure depended on "whether a portion of the fetus' body is drawn into the vagina."¹⁵² Therefore, this language in the Act directly answers the Court's criticism of one part of the Nebraska statute's language. However, this argument fails as well. In *Planned Parenthood*, the plaintiffs' and the government's experts agreed that the type of extraction described in the Act could occur not only in D&X abortions but also in any D&E or induction abortion.¹⁵³

Third, the Act prohibits an "overt act" other than the completion of delivery, which effects fetal demise.¹⁵⁴ The government argued in *Planned Parenthood* that physicians only

¹⁵⁰ Compare 18 U.S.C. § 1531 at (b)(1)(A) (defining a "partial-birth abortion" as a vaginal delivery of a fetus until either the entire head or any part of the fetal trunk past the navel is outside the body of the mother), with NEB. REV. STAT. ANN. § 28-326(9) (proscribing the delivery into the vagina of an entire or substantial portion of a living fetus).

¹⁵¹ See *Stenberg*, 530 U.S. at 938-39 (rejecting the "substantial portion" language by noting that it did not clarify whether a D&E, where a foot or arm is drawn through the cervix, or an D&X, where the body up to the head is drawn through the cervix, was the proscribed procedure).

¹⁵² *Id.* at 939.

¹⁵³ *Planned Parenthood*, 320 F. Supp. 2d at 972.

¹⁵⁴ Compare 18 U.S.C. § 1531 at (b)(1)(B) (prohibiting the performance of an overt act other than the completion of delivery that effects fetal demise), with NEB. REV. STAT. ANN. § 28-

perform an “overt act” as required by the Act in D&Xs rather than other abortion procedures because the overt act must occur at a particular point and place in time.¹⁵⁵ However, requiring an “overt act” also fails to limit the prohibited procedure to only D&Xs because physicians perform so-called overt acts in other kinds of abortion procedures as well.¹⁵⁶ In any D&E or induction, a physician may, in order to perform the safest possible abortion, need to perform an “overt act,” other than completing delivery, which the physician knows the fetus cannot survive and that, in fact, “kills” the fetus.

All three of these linguistic differences fail to make the Act constitutional because they could apply not only to post-viability D&X abortions but also to D&E or induction abortion procedures before fetal viability.¹⁵⁷ Because the Act bans abortions physicians from performing D&X, D&E, and induction abortions at any time during a pregnancy, regardless of gestational age or fetal viability, it constitutes an undue burden and is unconstitutional.

326(9) (prohibiting the performance of such a procedure that the physician knows will kill the fetus).

¹⁵⁵ *Planned Parenthood*, 320 F. Supp. 2d at 971.

¹⁵⁶ *See id.* (describing the types of overt acts taken in procedures such as D&Es or inductions).

¹⁵⁷ *See id.* at 973-74 (stating that physicians may perform each element as defined in the Act while performing any D&E procedure, some induction abortions, and during the treatment of some spontaneous miscarriages); *see also* 149 Cong. Rec. S3600 (daily ed. March 12, 2003) (statement of Sen. Feinstein). *Accord* 149 Cong. Rec. H4939 (daily ed. June 4, 2003) (statement of Rep. Greenwood); 149 Cong. Rec. H4948 (daily ed. June 4, 2003) (statement of Rep. Baldwin) (noting Congress’s rejection of alternatives and amendments to the Act that would limit its applicability to viable fetuses).

Further, the Act's prohibitions may apply to D&Es or inductions rather than solely D&Xs because when a physician begins a D&E or induction abortion, the physician cannot determine if the procedure will proceed in a manner that violates the Act. This prevents the physician from being able to follow the safest course of treatment possible for the patient without fearing for the physician's own legal liability.¹⁵⁸ Physicians perform many D&Es and inductions while the fetus still has a detectable heartbeat or pulsating umbilical cord.¹⁵⁹ Also, any D&E or induction may result in intact delivery of the fetus up to the proscribed amount.¹⁶⁰ For example, when performing a D&E, the physician may disarticulate a small fetal part on an initial pass through the uterus with the forceps that does not effect immediate fetal demise and then on the next pass bring the fetus out past its navel.¹⁶¹ Further, in order to complete a particular abortion in the

¹⁵⁸ *Planned Parenthood*, 320 F. Supp. 2d at 973.

¹⁵⁹ *See id.* at 971 (citing expert testimony from trial).

¹⁶⁰ *See id.* at 971-72 (stating that in any procedure, physicians may extract a living fetus in a breech presentation until part of the fetal trunk past the navel is outside the body of the mother).

¹⁶¹ *See id.* (providing other examples of a D&E that violates the Act despite the physician's intent: where the physician brings out a fetal part either attached to the rest of the fetus; where the physician extracts the fetus intact until the skull lodges at the internal cervical opening; or where the physician pulls the fetus out intact until the trunk past the navel is outside the woman's body, but it is not extracted so far that the skull lodges at the cervical opening, or in an induction where fetal demise has not occurred by the time the fetus exits the woman's body).

safest manner, a physician potentially may need to perform an overt act as described in the Act in any D&E or induction.¹⁶²

b. The Act May Not Be Narrowly Construed To Prohibit Only D&X Abortions.

Even if Congress intended to ban only D&Xs in the Act, the Act still fails the undue burden test.¹⁶³ The government in *Stenberg* argued the legislature intended to ban only D&Xs.¹⁶⁴ This argument fails first because the Court found the statute unconstitutional despite the legislature's alleged intent.¹⁶⁵ Second, Congress indicated that its intent was not to ban solely D&Xs in the Act because Congress failed to specifically name the prohibited procedure, despite having the opportunity to do so and the *Stenberg* decision as a guideline for abortion legislation.¹⁶⁶ In fact, Congress did not merely overlook the *Stenberg* Court's language

¹⁶² *See id.* at 972 (explaining that a physician may determine that a fetus cannot survive delivery after its entire head or torso up to the navel is outside the mother and may therefore need to perform an overt act to effect fetal demise)

¹⁶³ *See id.* at 969 (finding that Congress intended to ban only D&Xs, and not D&Es by disarticulation, induction, or any other abortion procedures).

¹⁶⁴ *Stenberg*, 530 U.S. at 938.

¹⁶⁵ *Id.* at 939.

¹⁶⁶ *See* 149 Cong. Rec. S3600 (daily ed. March 12, 2003) (statement of Sen. Feinstein). *Accord* 149 Cong. Rec. H4939 (daily ed. June 4, 2003) (statement of Rep. Greenwood); 149 Cong. Rec. H4948 (daily ed. June 4, 2003) (statement of Rep. Baldwin) (noting Congress's rejection of alternatives and amendments to the Act that would limit its applicability).

concerning legislative intent in drafting statutes, rather Congress intentionally chose not to explicitly exempt D&E abortion procedures from the ban in the Act.¹⁶⁷

Because Congress expressly failed to acknowledge or include references to D&E or D&X procedures by name or technical definition, construing that the statute permits one type of procedure and prohibits another is unreasonable.¹⁶⁸ A court may not construe a statute narrowly where the construction conflicts with an express statutory definition.¹⁶⁹ The Act contains an express statutory definition of partial-birth abortion. The *Stenberg* Court held that even if the Nebraska legislators intended to ban only D&Xs, the Court could not construe the statute according to their intent where that interpretation, even if it was constitutional, conflicted with

¹⁶⁷ See *Planned Parenthood*, 320 F. Supp. 2d at 974 (indicating that the Congressional Record demonstrated that opponents of the Act pointed out the potential inclusion of D&Es in the Act's ban and proposed remedies which Congress rejected).

¹⁶⁸ See *id.* (stating that Congress could have excluded procedures other than the D&X from the ban); see also *Farmer*, 220 F.3d at 140 (declaring an abortion regulation unconstitutional and noting that if the Legislature sought to ban solely D&Xs it easily could have demonstrated that intent by specifically naming the D&X procedure or by using the medical definition set forth by the ACOG); cf. *Women's Medical Prof'l Corp. v. Taft*, 353 F.3d 436, 452-53 (6th Cir. 2003) (finding an Ohio statute constitutional because it explicitly permitted D&E procedures).

¹⁶⁹ See *Meese v. Keene* 481 U.S. 465, 484-85 (1987) (requiring that a court follow a statute's explicit definition, even where that definition varies from the term's ordinary meaning).

the language of the statute.¹⁷⁰ Likewise, courts cannot construe the Act narrowly, to include only D&Xs, even if Congress intended for the Act to ban only D&X abortions. Moreover, courts find a statute unconstitutional where the legislature knew when it enacted the statute that the statute contained language rendering it unconstitutional and yet failed to pass a more limited statute.¹⁷¹

C. Regardless Of The Court’s Interpretation Regarding The Scope Of The Act, The Act Is Unquestionably Unconstitutional Because It Does Not Contain A Health Exception.

Stenberg created a per se rule that where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger a woman’s health, an abortion restriction *must* contain an exception for the pregnant woman’s health.¹⁷² Statutes must

¹⁷⁰ *Stenberg*, 530 U.S. at 945-46; *but see id.* at 990 (Thomas, J., dissenting) (writing that it is “highly doubtful” one could interpret the Act’s definition of partial-birth abortion to include D&E abortions).

¹⁷¹ *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998) (holding a Kentucky partial birth abortion statute unconstitutional because it placed an undue burden on a woman's right to an abortion). The court noted the legislature had focused directly on protected activity “in a manner which everyone knew might be unconstitutional” and moreover that the legislature could have passed a statute of more limited reach and still achieved its supposed objective, to ban D&Xs, yet instead it decided to go farther, creating an undue burden on a large fraction of the women the statute would affect. *Id.*, *affirmed* *Eubanks v. Stengel*, 224 F.3d 576 (6th Cir. 2000).

¹⁷² 530 U.S. at 921, 936-37; *Richmond Med. Ctr. For Women v. Hicks*, 409 F.3d 619, 624-26 (4th Cir. 2005); *see also Richmond Med. Ctr. For Women v. Hicks*, 301 F.Supp. 2d 499, 514-515 (ED Va. 2004) (“The Act must include an exception for both the woman’s live and health.”). *But see Richmond Med. Ctr. For Women v. Hicks*, 422 F.3d 160, 163-65 (Niemeyer, J., dissenting)

have a health exception that excludes from the ban health risks caused as a result of the pregnancy itself, an unrelated condition, or a statutory regulation requiring women to use riskier methods of abortion.¹⁷³ In light of the fact that the Supreme Court limits abortion restrictions more strictly for pre-viability than post-viability, a health exception is required for pre-viability abortions as well as post-viability abortions.¹⁷⁴

The Act does not contain a health exception. Consequently, assuming *arguendo* that the Court (incorrectly) interprets the Act so narrowly as to ban only post-viability D&X abortions, the issue would become whether substantial medical authority supports the proposition that prohibiting D&Xs could endanger women's health.¹⁷⁵ If substantial medical authority supports that proposition, the Act is unconstitutional.

1. *Substantial Medical Authority Supports the Proposition that Banning D&Xs May Endanger Women's Health.*

(disagreeing with the majority's decision to deny rehearing en banc and concluding that the majority's decision inherently adopted a per se constitutional rule and a liberal standard for evaluating facial challenges to statutes, which Justice Niemeyer asserted *Stenberg* did not require).

¹⁷³ See *Stenberg*, 530 U.S. at 931 (establishing that a health risk is the same whether it arises from regulating a method of abortion or from barring abortion entirely).

¹⁷⁴ See *id.* at 930 (noting that since the law mandates a health exception to make a post-viability abortion constitutional, it must require the same for pre-viability abortions because the state has a smaller interest in the potential life of the fetus with pre-viability abortions).

¹⁷⁵ *Stenberg*, 530 U.S. at 938; *Nat'l Abortion Fed'n II*, 437 F.3d at 285.

All three of the federal appellate courts that heard challenges to the Act found substantial medical authority showed banning D&Xs outright could endanger women’s health.¹⁷⁶ The Fourth Circuit also reached the same conclusion when evaluating a state late term abortion statute in 2005.¹⁷⁷ Moreover, the Supreme Court itself found that a statute banning D&Xs must have a health exception to survive constitutional scrutiny.¹⁷⁸ The Court found, where “a statute altogether forbids [D&X] [it] creates a significant health risk.”¹⁷⁹

There is evidence that D&Xs often present significant medical benefits over D&E or other abortion procedures.¹⁸⁰ First, D&Xs take less time than other abortion procedures.¹⁸¹ The

¹⁷⁶ See *Nat’l Abortion Fed’n II*, 437 F.3d at 285 (“Unquestionably, such ‘substantial medical authority’ exists.); *Planned Parenthood II*, 435 F.3d at 1174-75 (“[C]learly ... no such consensus exists The government all but admits ... that no medical consensus exists regarding the need for the prohibited procedures to preserve the health of women in certain circumstances.”) (citation to record omitted); *Carhart II*, 413 F.3d at 802 (“If one thing is clear from the record in this case, it is that no consensus exists in the medical community In fact, one of the government’s witnesses himself testified that no consensus exists in the medical community”).

¹⁷⁷ *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 626 (4th Cir. 2005) (“[*Stenberg*] has already established, based on substantial medical authority, that a statute prohibiting the intact D&E/D&X abortion procedure necessarily ‘creates a significant health risk’ and ‘must [therefore] contain a health exception.’”) (citing 530 U.S. at 938).

¹⁷⁸ *Stenberg*, 530 U.S. at 938.

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 932 (reiterating that on the basis of medical testimony, the Court concluded that the D&X procedure is usually safer than the D&E and other abortion procedures).

less time a procedure takes, the safer from the patient undergoing it, in virtually any medical procedure, because it means the body spends less time vulnerable to infection and in distress from the presence of foreign objects.¹⁸² Second, D&Xs are less invasive because they do not involve surgery, as opposed to hysterectomy or hysterotomy.¹⁸³ Third, they do not require the pregnant woman to undergo labor, which is hard on the woman's body and can be dangerous.¹⁸⁴ Fourth, as explained above, D&Xs may sometimes be safer even than D&Es because they involve fewer passes through the uterus and do not entail fragmenting fetal parts while the fetus is still in the uterus, both of which can result in puncturing of the pregnant woman's organs.¹⁸⁵ Therefore, the Court must find that substantial medical authority exists supporting the

¹⁸¹ *Compare Planned Parenthood*, 320 F. Supp. 2d at 962 (explaining that D&Es by disarticulation require approximately ten to fifteen passes with the forceps through the cervix) *with Stenberg*, 530 U.S. at 927 (finding that in D&X abortions, the physician removes the fetus from the cervix in one pass rather than several passes).

¹⁸² *Planned Parenthood*, 320 F. Supp. 2d at 962.

¹⁸³ *Stenberg*, 530 U.S. at 927; *Planned Parenthood*, 320 F. Supp. 2d at 963, 1000; *see also Woods*, 982 F. Supp. at 1376 (finding the statute unconstitutional where it would leave hysterotomy as the only abortion procedure available to women, and noting hysterotomy's significantly higher morbidity rate).

¹⁸⁴ *See Planned Parenthood*, 320 F. Supp. 2d at 962-63 (indicating that with an induction abortion the pregnant woman undergoes labor to expel the fetus and that the risks are so high that the physician must monitor the pregnant woman continuously for at least twenty-four hours).

¹⁸⁵ *See infra* notes 50-51, and accompanying text (explaining benefits to women's health of D&Xs over D&Es).

proposition that D&Xs may in some circumstances be the best procedure due to a woman's particular health situation. Yet, like the Nebraska statute at issue in *Stenberg*, the Act only excepts procedures from the ban where they are necessary to save the pregnant woman's life.¹⁸⁶

2. *Under Even the Most Deferential Level of Review, the Court Cannot Defer to Congress's Findings of Fact in this Case because the Record Before Congress Clearly Demonstrates a Division in the Medical Community Regarding the Necessity of Performing the D&X Procedure in Some Instances.*

In drafting the Act, Congress expressly disagreed with the *Stenberg* Court and the medical evidence to the contrary, and decided that substantial medical authority showed D&Xs were never safer than other abortion procedures.¹⁸⁷ In the appellate court proceedings challenging the Act, the government has contended that the courts must defer to Congress's factual findings as long as they are supported by substantial evidence;¹⁸⁸ while Plaintiffs-Appellees argued that the "substantial evidence" standard does not apply, and instead that

¹⁸⁶ See 18 U.S.C. § 1531 at (a) (2004) (allowing a physician to perform a "partial-birth abortion" where it is required to save the life of the pregnant woman due to potential death arising from a physical disorder, illness, or injury, including a life-threatening physical condition caused by or arising from the pregnancy itself).

¹⁸⁷ See 18 U.S.C. § 1531 at (e)(1) (finding a "moral and ethical consensus" that partial-birth abortion is never medically necessary and rather that partial-birth abortion is a disfavored procedure).

¹⁸⁸ See *Planned Parenthood*, 320 F. Supp. 2d at 1011 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)) (establishing a level of judicial deference due congressional findings of fact in an interaction of industries case).

Congress's findings are unreasonable.¹⁸⁹ These findings of fact directly contradict the Supreme Court's conclusions concerning the safety of D&E and D&X abortion procedures.¹⁹⁰

First, Congress found that a "partial-birth abortion is never medically necessary" to save the life of the pregnant woman.¹⁹¹ Second, Congress explicitly opposed the Supreme Court's finding in *Stenberg* that "partial-birth abortion" is in some instances the safest procedure for the pregnant woman.¹⁹² Congress asserted that "overwhelming" evidence presented at the *Stenberg* trial as well as evidence presented at Congressional hearings indicated that partial-birth abortion is never medically necessary.¹⁹³ Additionally, Congress claimed the *Stenberg* Court was obligated to accept erroneous findings of fact from the federal district court under the applicable standard of review.¹⁹⁴ Last, Congress asserted that Congress may make its own factual findings and that the Supreme Court must afford them "great deference" in future cases.¹⁹⁵

¹⁸⁹ See *Nat'l Abortion Fed'n II*, 437 F.3d at 286 (noting that while the important issue of what level of deference the courts must give to Congressional findings of fact is unclear, the court is nevertheless bound to follow the Court's decisions in *Roe*, *Casey*, and *Stenberg* are clear and binding); *Planned Parenthood II*, 435 F.3d at 1174 (concluding that the Court's explanation of the level of deference to afford congressional findings is unclear, but that Congress's findings fail both the Government's and the Appellees' asserted standard); *Carhart II*, 413 F.3d at 802

¹⁹⁰ See *Stenberg*, 530 U.S. at 932 (opining that significant medical authority supports the proposition that "partial-birth abortion" is the safest procedure for some pregnant women).

¹⁹¹ 18 U.S.C. § 1531 at (e)(1).

¹⁹² *Id.* at (e)(3-4).

¹⁹³ *Id.* at (e)(5).

¹⁹⁴ *Id.* at (e)(4).

While the Court has not provided clear guidance on the standard it applies to congressional findings of fact, here the standard will not matter because Congress's findings would fail any level of scrutiny.¹⁹⁶ Congress's factual findings would fail even the most stringent test, substantial deference, because Congress did not draw reasonable inferences based on substantial evidence.¹⁹⁷ The evidence in the record before Congress when it passed the Act, the contradictory congressional findings themselves,¹⁹⁸ the evidence introduced in *Stenberg*,¹⁹⁹

¹⁹⁵ *Id.* at (e)(8).

¹⁹⁶ See *Planned Parenthood II*, 435 F.3d at 1173-75 (describing the arguments from each party on the issue and articulating the various standards potentially applicable to evaluating Congress's findings of fact in the Act).

¹⁹⁷ See *Planned Parenthood*, 320 F. Supp. 2d at 1013-14 (disregarding Congress's findings because they directly contradict the Supreme Court's findings in *Stenberg* concerning the safety and necessity of D&X abortion procedures).

¹⁹⁸ Compare 18 U.S.C. § 1531(2)(1) (finding, "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is never medically necessary"), with 18 U.S.C. § 1531(14)(C) (concluding "there is no consensus" among obstetricians about the use of D&Xs). See also *Planned Parenthood II*, 435 F.3d at 1174 ("nearly half (22 out of 46) of all individual physicians who expressed non-conclusory opinions to Congress stated that the banned procedures were necessary in at least some circumstances, as did professors of obstetrics and gynecology from many of the nation's leading medical schools") (internal citations and quotations omitted); *Planned Parenthood*, 320 F. Supp. 2d at 1025 (noting "Congress . . . had before it a joint statement from the AMA and ACOG, the two largest medical organizations

and the evidence introduced in the courts which have evaluated the Act²⁰⁰ all evidence the

taking positions on the issue, which recognized the disagreement among and within the two organizations.”

¹⁹⁹ *Stenberg*, 530 U.S. at 931-36 (articulating eight arguments the government made to support its assertion that D&Xs are never medically necessary, and refuting each one.)

²⁰⁰ *See Planned Parenthood II*, 435 F.3d at 1174 75 (“The evidence before Congress at the time it passed the Act, as well as other evidence presented during litigation, has led every court that has considered the statute’s constitutionality to conclude that no medical consensus exists that the abortion procedures outlawed by the Act are never medically necessary ... and we agree.”); *Carhart II*, 413 F.3d at 802 (“If one thing is clear from the record in this case, it is that no consensus exists in the medical community. The record is rife with disagreement on this point, just as in *Stenberg*.”); *Carhart*, 331 F. Supp. 2d at 1008 (“In fact, there was no evident consensus in the record that Congress compiled. There was, however, a substantial body of medical opinion presented to Congress in opposition ... Based upon [Congress’s] own record, it was unreasonable to find, as Congress did, that there was ‘consensus’ of medical opinion supporting the ban. Indeed, a properly respectful review of that record shows that a substantial body of contrary, responsible medical opinion was presented to Congress. A reasonable person could not conclude otherwise.”); *National Abortion Federation*, 330 F.Supp. 2d at 482 (“There is no consensus that [D&X] is never medically necessary, but there is a significant body of medical opinion that holds the contrary.”); *Planned Parenthood*, 320 F.Supp. 2d at 1025 (“[T]he evidence available to Congress in passing the Act in 2003, and currently before this court, very clearly demonstrates ... that there is no medical or ethical consensus regarding either the humanity, necessity, or safety of the procedure.”).

substantial disagreement in the medical community regarding whether such procedures are ever medically necessary. Moreover, as the Ninth Circuit pointed out, “[t]he government all but admits ... that no medical consensus exists regarding the need for the prohibited procedures to preserve the health of women in certain circumstances.”²⁰¹ It would be absolutely unreasonable for the Court to defer to Congress’s findings and conclude that there is a consensus in the medical community that D&Xs are never medically necessary.

Notably, “*Stenberg* does not leave it to a legislature (state or federal) to make a finding as to whether a statute prohibiting an abortion procedure constitutionally requires a health exception. On the contrary, *Stenberg* leaves it to the challenger of the statute, i.e., the proponent of a required health exception, to point to evidence of ‘substantial medical authority’ that supports the view that the procedure might sometimes be necessary to avoid risk to a woman's health.”²⁰²

CONCLUSION.

So-called “partial-birth abortion” is a paralyzingly sensitive, politicized issue. Understandably so. There is no denying that the procedures I described above are unpleasant. Learning about them is shocking to those who have never confronted them. I readily admit that when I started writing this Article, I did not expect to be disturbed. After all, I am a vigorously pro-choice feminist. But it did disturb me; and I had to carefully consider my thoughts on the issue. I weighed my deep commitment to women’s right to bodily integrity with the truly

²⁰¹ See *Planned Parenthood II*, 435 F.3d at 1175 (citing Appellant's Reply Brief at 25, which admits "both sides now concede the existence of 'contradictory evidence' in the congressional and trial records").

²⁰² *National Abortion Federation II*, 437 F.3d 287.

upsetting nature and circumstances of late-term abortions; and I attempted like so many before me to limit and ground my emotional responses in the law. I concluded that the ultimate issue is whether the well-being of a human still in a woman's womb outweighs a woman's right to have her physician perform a procedure in whatever way the physician feels is safest for the woman.

We can argue unendingly about how often or not often late-term abortion is performed, at what point the fetus becomes a person, the reasons women have abortions later in their pregnancies, etc. We can tell horror stories of malformed fetuses a physician will not be permitted to abort if the Act remains in effect or horror stories about a fetus potentially feeling pain as a physician performs an abortion. I honestly do not think we will come up with a clear answer. And ultimately, none of those things are the issue. The law does not appear that it will have a basis in the near future to declare the point at which a fetus becomes a legal human being. Consequently, the competing horror story rhetoric is irrelevant.

The point on which this debate should focus is that just like with most if not all medical procedures, a physician does not know what is going to happen when he or she begins performing an abortion. A doctor *must* be able to proceed in the manner that is safest for the health of the fully-formed adult human being, who the law recognizes as a person, lying on the table in front of him or her.

Legally, the Court should find the Act unconstitutional because it is vague, it imposes an undue burden on a woman's right to terminate her pregnancy prior to viability, and it does not contain an exception to the ban when a woman's health is endangered by the pregnancy or would be endangered by birth. Because Congress enacted this Act in such flagrant contradiction to constitutional law, however, Congress should instead admit its mistake before the Act ever reaches the Court and repeal the Act so the people of the United States understand that their

elected representatives understand this law at its core violates women's rights to privacy and bodily integrity.